

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )

Telecommunications Services )

Inside Wiring )

Customer Premises Equipment )

In the Matter of )

Implementation of the Cable Television )

Consumer Protection and Competition )

Act of 1992 )

CS Docket No. 95-184

MM Docket No. 92-260

**PETITION FOR RECONSIDERATION**

The National Cable Television Association ("NCTA"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, seeks reconsideration of several discrete aspects of the Commission's decision in the above-captioned proceeding.

In particular, NCTA recommends, on reconsideration, that the Commission find:

- The new home run wiring procedures should be presumed not to apply in states that have enacted access to premises statutes. Most if not all mandatory access laws confer an enforceable right to remain on an MDU's premises, and it is arbitrary, capricious and wasteful of resources to presume that, unless the state's highest court has addressed the issue, the opposite is true.
- The requirement to transfer ownership should be stayed if a state court, at any time prior to the transfer of ownership in home run wiring, enjoins or otherwise restrains the implementation of the new procedures pursuant to state law.
- Where ownership of home run wiring is transferred from the incumbent to either the MDU owner or an alternative service provider, actual ownership should not transfer prior to actual payment by the MDU owner or alternative service provider of the agreed upon compensation.

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**I. THE NEW PROCEDURE SHOULD NOT APPLY WHERE A STATE HAS ADOPTED AN ACCESS TO PREMISES LAW**

The Commission emphasizes throughout its Order that its new procedural rules for the disposition of home run wiring are meant to apply “only where the incumbent provider no longer has an enforceable legal right to maintain its home run wiring on the premises against the will of the MDU owner.”<sup>1</sup> Where there is a dispute as to whether such an enforceable legal right exists, the Commission has adopted a presumption that the rules will apply “unless and until the incumbent obtains a court ruling or an injunction enjoining its displacement during the 45-day period following the initial notice.”<sup>2</sup> This presumption is reversed in only one limited circumstance -- specifically, “where a state’s highest court has found that, under its state mandatory access statute, the incumbent always has an enforceable right to maintain its home run wiring on the premises.”<sup>3</sup> In that circumstance, the burden will “shift to the new provider to obtain a judicial determination to the contrary.”<sup>4</sup>

The exception carved out by the Commission for right-of-access states is far too limited. In those states that have adopted statutes granting mandatory access to cable operators, the presumption should be that the operator *does* have an enforceable right to remain on the premises and that the rules *do not* apply.

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<sup>1</sup> Order, ¶69.

<sup>2</sup> *Id.*, ¶ 77.

<sup>3</sup> *Id.*, ¶ 78.

<sup>4</sup> *Id.*

Because the general purpose of mandatory access statutes is to confer precisely such a right, several commenting parties urged that the rules not apply at all in right-of-access states. The Commission rejected that request because it was “unwilling to conclude that state mandatory access statutes *always* grant incumbents the right to maintain their home run wiring in an MDU over the MDU owner’s objection.”<sup>5</sup> It determined, instead, that its procedures would “apply in mandatory access states to the extent state law does not permit the incumbent to maintain its home run wiring . . . against the will of the MDU owner.”<sup>6</sup>

The Commission’s reluctance to conclude that mandatory access laws *always* confer a right to remain on the premises might arguably justify its refusal to grant a blanket exemption in right-of-access states. But it hardly justifies a presumption that, absent a ruling from the highest state court, such laws do *not* confer such a right. Such a presumption would only be justified if the Commission had reason to believe that it was more likely that a law did not confer such a right than that it did.

All evidence suggests, however, that most if not all mandatory access laws *do* guarantee a right to remain on an MDU’s premises. That is the point of these laws, after all, and the Commission does not contend to the contrary. As Adelphia Cable Communications explained in its comments,

[m]ost mandatory access statutes simply direct that owners of MDUs not interfere with the installation of cable television facilities on their property, or that residents of MDUs not be denied access to any available franchised or licensed cable television

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<sup>5</sup> *Id.*, ¶ 79 (emphasis added).

<sup>6</sup> *Id.*

service. Such statutes uniformly allow cable operators to install *and maintain* broadband facilities in MDU buildings.<sup>7</sup>

In some states, as the Commission's Report and Order noted, the cable operator's right of access is triggered, in the first instance, by a subscriber's request for service.<sup>8</sup> But even those statutes, as Time Warner Cable made clear, "permit the cable operator to maintain its wiring within MDUs indefinitely."<sup>9</sup> And, in any event, "most states' mandatory access statutes are *not* triggered by a tenant's request for service. . . ."<sup>10</sup>

Therefore, the Commission had no basis for presuming that a mandatory access statute does not confer an enforceable legal right to remain on the premises unless the state's highest court has ruled to the contrary. Mandatory access statutes generally do confer such a right, and they should therefore be presumed to confer such a right unless the MDU owners can demonstrate, in particular cases, that they do not.

It is arbitrary and capricious to establish a presumption wholly at odds with empirical probabilities. And it is acutely wasteful of resources to require operators in right-of-access states to initiate court proceedings where they have a statutory right to remain on the premises -- or to litigate up to the highest state court to obtain a ruling that confirms the obvious. Moreover, as a practical matter, if a lower court finds that the statute does confer a right to remain on the

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<sup>7</sup> Comments of Adelphia Cable Communications, CS Docket No. 95-184, Sept. 25, 1997, at 11-12 (emphasis added).

<sup>8</sup> Order, ¶ 79.

<sup>9</sup> Comments of Time Warner Cable, CS Docket No. 95-184, Sept. 25, 1997, at 32.

<sup>10</sup> *Id.* at 29.

premises and no appeal is taken by the opposing side, it will not even be possible to obtain a ruling from the highest state court.

**II. A STATE COURT STAY, IF ENTERED AT ANY POINT PRIOR TO THE TRANSFER OF OWNERSHIP, SHOULD STAY THE EFFECTIVENESS OF THE HOME RUN WIRING PROCEDURES.**

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The Order applies the presumption and the transfer of ownership procedures “... in the absence of a state court ruling or injunction obtained within 45 days of the initial notice.”<sup>11</sup> Rejecting proposals to stay proceedings upon the filing of a request for injunction pending a final judicial ruling, the Order makes the failure of the incumbent to obtain a judicial injunction within 45 days of the landlord’s notice key to the entire process.

If the incumbent is unable to obtain a stay or final ruling within 45 days, the Commission will *presume* for purposes of the procedural rules, pending further action, that the incumbent has no right to remain on the premises against the incumbent’s will. If the court does not rule within the 90-day period (or the 60-day period for unit-by-unit disposition) set forth in the rules, ownership will transfer even though a final judicial ruling may eventually determine the incumbent had a right to remain all along. The transfer of ownership would not occur but for the Commission’s procedural rules.

The Order maintains that an incumbent’s failure to obtain a state court injunction within 45 days “... justifies a presumption that the incumbent no longer has an enforceable legal right to remain on the premises.”<sup>12</sup> The basis for this conclusion is unsupported. The Order grounds the 45-day limit on the mere assertion, without citation, that the agency has not received persuasive

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<sup>11</sup> *Id.* at ¶78.

<sup>12</sup> *Id.* at ¶77.

evidence “... that state courts will not respond expeditiously.”<sup>13</sup> But there is no evidence that state courts will generally rule within 45 days, as opposed to a longer period.

In any event, there is no reason why a court injunction issued after 45 days should have any different effect from one issued before that deadline. If a state court rules in favor of the incumbent on day 46, day 89 or even day 91, it should be presumed that the incumbent had a right to maintain its wiring on the premises, and no further steps to elect and implement a transfer of control procedure should be required, pending a final outcome of the litigation.

**III. THE COMMISSION SHOULD CLARIFY THAT, IN CIRCUMSTANCES IN WHICH THE PARTIES AGREE TO A SALE OF THE WIRING, THE TRANSFER WILL NOT TAKE PLACE PRIOR TO THE INCUMBENT’S RECEIPT OF THE AGREED UPON COMPENSATION.**

The Order offers an incumbent three options for the disposition of home run wiring where it owns the wiring, has no enforceable legal right to maintain the wiring on the MDU’s premises, and is notified by the MDU owner that its service to the building will terminate or that the MDU owner will allow unit-by-unit compensation. In these circumstances, the incumbent may abandon or remove the home run wiring, or it may sell the wiring to the MDU owner or the alternative service provider.

Where the incumbent elects to sell, the parties are given 30 days to negotiate a price that appropriately compensates the incumbent for its ownership of the home run wiring. If negotiations fail, the incumbent may elect to submit the issue of the price to binding arbitration. The arbitration process, like the negotiation process, is designed to lead to a sum that the MDU owner (or, in its stead, the alternative service provider) will pay to the incumbent.

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<sup>13</sup>

*Id.*

It goes without saying that following the final determination of the sale price, but before the actual transfer of ownership, the incumbent should receive in hand the agreed upon compensation. But the Order does not include a procedure to ensure that this will happen.

Under the new rules, ownership will transfer at the end of the 90-day period initiated by the landlord's notice to the incumbent (or, in the case of unit-by-unit disposition, at the earlier of actual termination or the subscriber's requested date of termination). Where the incumbent elects to sell, it should not be forced to yield control of the wiring prior to receiving compensation. If the incumbent were required to yield control prior to receiving payment, a recalcitrant new owner could benefit from the use of the wiring without payment of appropriate compensation.

Absent a Commission regulation, moreover, the new owner may lack the necessary incentive to compensate the incumbent in a timely manner. The presence of specific deadlines, under both the building-by-building and unit-by-unit cases, by which the incumbent must turn over the wiring may suggest the tactic of delaying payment beyond such deadlines in the certain knowledge that the wiring will transfer whether or not payment is made. If this were to occur, the incumbent might be forced to initiate legal proceedings to obtain the already agreed upon compensation. While this eventuality might be rare, it should not occur at all. This business tactic should not be available to the purchaser.

The Commission should, therefore, clarify that ownership in the wiring will not transfer prior to the incumbent's receipt of the agreed upon compensation. If the deadline passes without payment, the wiring should remain under the control of the incumbent.<sup>14</sup>

### **CONCLUSION**

For the foregoing reasons, the Commission should grant reconsideration of its decision in accordance with this petition.

Respectfully submitted,



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<sup>14</sup>

Although the discussion in this section is focused on the Commission's rules for the disposition of *home run* wiring, the Commission should, for similar reasons, adopt the same clarification with respect to its rules for the disposition of *cable home wiring*.